STATE OF MICHIGAN

IN THE SUPREME COURT

EVA DEVILLERS, as Guardian and Conservator of MICHAEL DEVILLERS,

Plaintiff-Appellee,

-vs-

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant,

_____/

Supreme Court No. 126899

Court of Appeals
No. 257449

Oakland County Circuit Court
No. 02-045287-NF

BRIEF OF AMICUS CURIAE THE INSURANCE INSTITUTE OF MICHIGAN

PROOF OF SERVICE

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TABLE OF CONTENTS

Page

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

FEDERAL CASES

STATUTES

CONSTITUTIONAL PROVISIONS

LAW REVIEW MATERIALS

OTHER AUTHORITIES

MISCELLANEOUS

STATEMENT OF THE QUESTIONS PRESENTED

I.

SHOULD THIS COURT OVERRULE *LEWIS v DAIEE* BECAUSE IT IS NOT FAITHFUL TO THE STATUTORY TEXT OF MCL 500.3145(1) WHICH LIMITS A CLAIMANT'S RECOVERY FOR BENEFITS FOR ANY PORTION OF THE LOSS INCURRED MORE THAN ONE YEAR BEFORE THE DATE ON WHICH THE ACTION WAS COMMENCED?

Plaintiff-Appellee Eva DeVillers answers "No."

Defendant-Appellant The Auto Club Insurance Association answers "Yes."

The Oakland County Circuit Court presumably answers "No."

The Michigan Court of Appeals has not answered this question but declined to grant immediate appellate review.

Amicus Curiae The Insurance Institute of Michigan answers "Yes."

II

IF SO, SHOULD THIS COURT GIVE ITS DECISION RETROACTIVE EFFECT?

Plaintiff-Appellee Eva DeVillers answers "No."

Defendant-Appellant Auto Club Insurance Association answers "Yes."

The Oakland County Circuit Court presumably answers "No."

The Michigan Court of Appeals has not answered this question but declined to grant immediate appellate review.

Amicus Curiae The Insurance Institute of Michigan answers "Yes."

STATEMENT OF FACTS

Amicus Curiae the Insurance Institute of Michigan adopts the statement of facts and proceedings set forth in the brief on appeal of the defendant-appellant the Auto Club Insurance Association.

STAEMENT OF THE STANDARD OF REVIEW

This Court reviews *de novo* questions of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991). A trial court's ruling on a motion for summary disposition is also reviewed *de novo*, *Maskery v Board of Regents of the University of Michigan,* 468 Mich 609; 664 NW2d 165, 167 (2003); *Hinkle v Wayne County Clerk,* 467 Mich 337, 340; 654 NW2d 315 (2002); and *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (2000). In engaging in such review, the appellate court must study the record to determine if the movant was entitled to judgment as a matter of law, *Groncki v Detroit Edison Co,* 453 Mich 644, 649; 557 NW2d 289 (1996) and *Adkins v Thomas Solvent Co,* 440 Mich 293, 302; 487 NW2d 715 (1992). Stated otherwise, giving the benefit of doubt to the non-movant, an appellate court is charged with independently determining whether the movant would have been entitled to judgment as a matter of law.

In the court below, the Auto Club Insurance Association sought partial summary disposition on the basis of the statute of limitations. (Apx 186a). The trial court's interpretation of the statute is also reviewed de novo. *Stanton v Battle Creek*, 461 Mich 611; 647 NW2d 508 (2002).

ARGUMENT I

THIS COURT SHOULD OVERRULE *LEWIS v DAIEE* BECAUSE IT IS NOT FAITHFUL TO THE STATUTORY TEXT OF MCL 500.3145(1) WHICH LIMITS A CLAIMANT'S RECOVERY FOR BENEFITS FOR ANY PORTION OF THE LOSS INCURRED MORE THAN ONE YEAR BEFORE THE DATE ON WHICH THE ACTION WAS COMMENCED.

This case presents the Court with the opportunity to correct past decisions that engraft on to clear statutory language a judicially-created exception to the statute of limitations based on tolling that the Legislature neither created nor intended. MCL 500.3145(1) bars recovery for any benefits for loss incurred more than one year before the date on which the lawsuit was begun:

> (1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

The language unambiguously limits recovery by providing a one-year back provision. *Id.* It provides no exceptions.

This Court has recognized that statutory analysis must begin with the wording of the statute itself. *Robinson v Detroit*, 462 Mich 439, 318; 459 NW2d 307 (2000). Each word of a statute is presumed to be used for a purpose, and as far as possible, effect must be given to every word, clause, and sentence. *Robinson*, 462 Mich at 318, citing *University of Michigan Board of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). In *Robinson*, this Court reiterated the principle that it could "not assume that the Legislature inadvertently made use of

one word or phrase instead of another." 462 Mich at 318, citing *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). It also emphasized that the clear language of a statute must be followed. *City of Lansing v Lansing Twp*, 356 Mich 641, 649; 97 NW2d 804 (1959).

In *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 643 NW2d 553 (2002), the Court explained yet another time that its "duty is to apply the language of the statute as enacted, without addition, subtraction, or modification." 466 Mich at 101. This Court emphasized its obligation to enforce the statutory text as written by stating:

> We may not read anything into the unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.... In other words, the role of the judiciary is not to engage in legislation.

Id. citing *Omni Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) and *Tyler v Livonia Public Schools*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999).

These principles apply here and mandate a reversal of *Lewis v DAIIE*, 462 Mich 93; 393 NW2d 167 (1986), *Johnson v State Farm*, 183 Mich App 752; 455 NW2d 420 (1990), and their progeny. In *Lewis*, this Court declined to enforce the one-year back limitation and substituted the Court's own version of public policy by adding a tolling provision that is nowhere to be found in the statute (or in any other applicable statute). Despite the absence of any statutory tolling provision and in the face of clear language specifically and expressly limiting recovery to loss incurred one year before the litigation, this Court announced a rule that tolled the provision from the time that a claimant submits a specific claim for benefits until the time the insurer formally denies the claim.

Taking its cue from *Lewis*, the Court of Appeals further expanded this judicially-created tolling provision to toll the period

> for that period of time which defendant knew or reasonably should have known that plaintiff was entitled to benefits under the automobile policy until such time as defendant either formally or explicitly denied liability for benefits or

> affirmatively informed plaintiff that she might be entitled to benefits under the policy and requested that she file a formal claim of benefits under the policy.

Johnson, 183 Mich App at 762-763. Nor are *Lewis* and *Johnson* the only appellate decisions to legislate regarding tolling. Having created a tolling rule out of whole cloth, Michigan's appellate courts have been faced with repeated questions concerning what counts as "formally or explicitly" denying liability of benefits, what amounts to notice, and related issues. See e.g., *Mt Clemens Mercy Hospital v Allstate Ins Co*, 194 Mich App 580; 487 NW2d 849 (1992) (denial of liability need not be in writing to be formal but must be explicit). Each of these decisions necessarily entails a further explication of "statutory" provisions with no grounding in the text.

This history makes clear that overruling *Lewis* and its progeny does not offend against the dictates of stare decisis. *Lewis* was itself enacted over a strong dissent authored by Justice Brickley, and concurred in by Justice Riley. Justice Brickley reasoned that "this judicial amendment of a clear legislative directive will have a pernicious long-term effect." 462 Mich at 172-173. He elaborated on the problem by emphasizing the "well-settled principle of this Court" that "'the explicit declaration of the legislature is the law, and the courts must not depart from it.'" 462 Mich at 173 quoting *Becker v Detroit Savings Bank*, 269 Mich 432, 436; 257 NW2d 853 (1934). Justice Brickley correctly characterized the majority decision as judicial legislation pointing out that

> Section 3145 is clear in its directive that a claimant cannot recover benefits for losses incurred more than one year prior to the commencement of the suit; not one year plus the period of time between making the claim and the denial of the claim as the majority holds.

Id. The majority's analysis allowed its view of the purposes of the act to supplant the statutory text. The majority's interpretation of "policy and consumer expectations" was also used to trump the unambiguous text. Contrary to the *Lewis* majority, the statute reflected a legislative balance of many different and even conflicting purposes, one of which was to protect against

stale claims and contingent liability. But this clear text-based purpose was judicially abrogated on the basis of the majority's non text-based policy concerns.

Having created a new tolling provision, the *Lewis* majority was forced to create further provisions to limit the effect of its decision such as its requirement that a claimant pursue the claim with "reasonable diligence." *Id.* This history reflects exactly the sort of problems that Justice Brickley predicted. Worse still, as *Johnson* reveals, having allowed the law to become unmoored from the statutory text, there is little protection against future decisions that further drift or, worse still, sail under full power away from legislatively-dictated limits to recovery. These difficulties are not surprising since the Court is embarked on the kind of polycentric decision-making that is more appropriately carried out by the legislature. See generally, Hart and Sacks, *The Legal Process* (1994), pp 161-167, 696-705. See also, Fuller, *The Forms and Limits of Adjudication*, 92 Harv L R 353, 394 (1978).

This Court has recognized that it is duty-bound to re-examine a precedent where its reasoning is fairly called into question. *Robinson*, 462 Mich at 464. It must do so by first examining whether the earlier decision was wrongly decided. 462 Mich at 462. If so, it then evaluates whether it is appropriate to overrule the decision by examining "the effects of overruling it, including most importantly the effect on reliance interests and whether that overruling would work an undue hardship because of that reliance." 462 Mich at 466. Justice Corrigan taught that an important factor in this evaluation is whether the past decision "would perpetuate an unacceptable abuse of judicial power." 462 Mich at 473. When a past decision has "usurp[ed] power properly belonging to the legislative branch," overruling it "does not threaten legitimacy.... [I]t restores legitimacy." 462 Mich at 473. When, "under the guise of statutory construction, this Court ignores the language of the statute to further its own policy views, it wrongly usurps the power of the Legislature." 462 Mich at 474. In those circumstances

a reversal is warranted in order to "restore judicial legitimacy by overruling decisions that wrongly usurped the power of the Legislature." 462 Mich at 474.

In *Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), the United States Supreme Court examined a series of policy factors that comprise the doctrine of stare decisis. Those included the questions of "(1) the "workability" of a prior case or line of cases; (2) the protection of reasonable reliance interests; (3) the erosion of the doctrine's foundations by subsequent decisions; (4) changed factual circumstances; and (5) the need to preserve public impressions of judicial integrity...." Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Presidential Effect of Roe and Casey?*, 109 Yale L J 1535, 1551 (2000). This Court has embraced a similar analysis when evaluating past precedent. *Robinson*, 462 Mich 439, 464 citing *Casey* with approval. See also *People v Kazmierczak*, 461 Mich 411, 424-425; 605 NW2d 667 (2000) and *Nawrocki v Macomb County Road Comm*, 463 Mich 143; 615 NW2d 702 (2000). Analysis of these factors supports the insurer's position.

The inquiry into workability is "essentially a question of whether the Court believes itself able to continue working within the framework established by a prior opinion." Michael Stokes Paulsen, 109 Yale L J at 1552. That consideration, when applied to the judicially-created tolling exception to claims, compels the conclusion that a reversal is in order. The failure to revisit and overturn *Lewis, Johnson*, and their progeny will leave in place an uncertain and expanding approach to interpretation of the statute, and one that allows the continuance of a huge, non-text-based exception to a clear limitational period. The practical workability of such an approach is more than questionable—it is impossible. Worse still, *Lewis* severely undercuts the protection that Michigan's legislature provided for Michigan insurers. The statute required quick litigation to resolve claims and eliminated large and uncertain contingencies that interfere with insurance

underwriting and increase the cost of premiums. It has been said that "[p]ublic policy is a very unruly horse, and when you once get astride it you never know where it will carry you." Burrough, J, *Richardson v Mellish*, 2 Bing 252 (1824). Having gotten onto this horse years ago when it issued its decision in *Lewis*, now is the time for the Court to dismount and return to the legislatively-enacted test.

Plaintiffs can point to no reliance interests that would support a decision retaining the tolling exception. *Id.* And this Court has recently taught, when considering the reliance interest, "it is to the words of the statute itself that a citizen first looks for guidance in directing his action." *Robinson*, 462 Mich at 468. A court should not "confound those legitimate citizen expectations by misreading or misconstruing a statute" because to do so will disrupt the reliance interest. If a past court has misread or misconstrued a statute, the "subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id.* Speaking for the Court, Justice Taylor explained that the court's distortion of the statute amounts to a "judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives." *Id.* Because of this, an error "can gain no higher pedigree as later courts repeat the error." *Id.*

There is no principled manner to ignore these over-arching principles of a text-based interpretation of MCL 500.3145(1). Justice Scalia explained that, where a statute "contains a phrase or sentence that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted...." *West Virginia University Hospitals, Inc v Casey*, 499 US 83; 111 S Ct 1138; 113 L Ed 2d 68 (1991). Having adopted a like view, this Court should not now ignore the Legislature's explicit limitation.

Finally, the need to preserve public impressions of judicial integrity supports a reversal. This Court has uniformly adopted and applied a text-based approach to statutory interpretation. See e.g. *Nawrocki, supra, Robinson, supra, Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). It has done so consistent with its view that this approach constitutes the faithful application of well-defined legal principles - not the predisposition of individual judges. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). Having repeatedly held that a court is "most justified in overruling an earlier case if the prior court misconstrued a statute," this Court should now faithfully apply that rule here. In doing so, a reversal is required.

This Court has rejected the legislative acquiescence rule that formerly supported the maintenance of erroneous prior judicial decisions. *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998); and *Donajkowski v Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999). That rejection makes sense and it also supports the insurer's position here. Treating an erroneous statutory interpretation as binding or affording it strong *stare decisis* weight might make sense if the legislature were perpetual. But it is not. Today's legislature may "leave in place an interpretation of a law simply because today's coalitions are different. The failure of a different body to act hardly shows that the interpretation of what an earlier one did is 'right.'" Frank H Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L R 422, 427 (1988). When a decision is founded upon plain error, refusing to follow it "cannot be fairly criticized as illegitimate." John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 NYU L R 1, 4 (1983).

Jonathon Swift's satire of the doctrine of *stare decisis*, reminds us to carefully consider and correct error if there is a cogent reason for doing so:

> It is a maxim among ... lawyers, that whatever had been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.

> These, under the name of precedents, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of directing accordingly.

Swift, Gulliver's Travels (Dodd Mead ed, 1950) , p 256. But this Court correctly has refused to continue to decide cases in accord with plain error based on a disregard of the language of the statute; instead, it has embarked upon a course of action directed towards restoring deference to the text of statutes that it interprets. As Justice Frankfurter said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Boys Markets v Retail Clerks*, 398 US 235, 255; 90 S Ct 1583; 26 L Ed 2d 199 (1970), quoting *Henslee v Union Planters Bank*, 335 US 595, 600; 69 S Ct 290, 293; 93 L Ed 2d 259 (1949) (Frankfurter, J, dissenting). The *Lewis* and *Johnson* courts impinged upon the legislature's sphere of decisionmaking to create a broad new exception to a clear statutory provision. *Stare decisis* neither commands nor supports the continued adherence to these precedents.

ISSUE II

THIS COURT SHOULD GIVE ITS DECISION RETROACTIVE EFFECT.

At the outset, it is important to reiterate the general rule. Statutory decisions apply retroactively; that is, a judicial decision explaining the meaning of a statute applies from the effective date of the statute. That notion finds its roots in Blackstone who explains that the duty of the court is not to "pronounce new law, but to maintain and expound the old one," *Linkletter v Walker*, 381 US 618, 622-623; 85 S Ct 1731; 14 L Ed 2d 60 (1965) (quoting 1 W Blackstone, *Commentaries* *69). This is consistent with the principle that a judge's function is not to legislate but to explain the meaning of legislation enacted by a legislative body. Even when overruling prior precedent, the new decision is "an application of what is, and therefore had been, the true law', *Linkletter*, 381 US at 623 (citing Shulman, *Retroactive Legislation*, in 13 Encyclopedia of the Social Sciences 355, 356 [1934]). One state court justice explained the thinking behind the rule:

> I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the legal decision, and that the former decision was not, and never had been the law, and is overruled for that very reason.

Gelpcke v City of Dubuque, 68 US (1 Wall) 175, 211 (1863) (Miller, J., dissenting).

Former Supreme Court Justice Harlan also spoke to the need for a court to adhere to the rule of retroactivity. He explained in one early decision that picking and choosing between similarly situated litigants those who alone will receive the benefit of a "new" rule of law offends against our basic judicial tradition. *Desist v United States*, 394 US 244, 256; 89 S Ct 1030; 22 L Ed 2d (1969) (Harlan, J. dissent). In Harlan's view, matters of principle were at stake that required the retroactive application of precedent. Harlan also deplored the doctrinal confusion that, to his view, stems from creating exceptions to the retroactive doctrine. 394 US at 258.

In more recent times, Justice Scalia and others have lambasted the judiciary for usurping legislative powers by toying with retroactivity. By way of example, Justice Scalia took the position that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be," *American Trucking Ass'n v Smith*, 496 US 167, 200; 110 S Ct 2323; 110 L Ed 2d 145 (1990) (Scalia, J., concurring). According to Scalia, applying decisions prospectively "is contrary to that understanding of 'the judicial power' which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, the very exercise of power asserted in [this case]." *Id.* at 201. See also Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 Harv J of Law & Public Policy 811 (2003).

In his concurring opinion in *Harper, supra*, Justice Scalia cautioned courts against the practice of tinkering with retroactivity as such behavior may well violate significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easer to overrule prior precedent.

509 US at 105, 113 S Ct at 2522. In addition, Justice Scalia warned that the "true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice." *Id.*, citing *James B. Beam Distilling Co v Georgia*, 501 US 529, 534; 111 S Ct 2439, 2443; 115 L Ed 2d 481 (1991) and other cases.

These principles apply with equal strength under Michigan law. Each time the Court arrogates to itself the power to legislate, it harms the administration of justice. Decisions that tinker with full retroactivity of a statute, in essence, amount to the judicial rewriting of the statute's effective date. By establishing a new effective date, the Court encroaches upon the

legislature's sphere of authority. Indeed, such a ruling may be seen as a violation of the Separation of Powers clause of the Michigan Constitution, which divides the powers of government into three branches and which bars one branch from exercising powers properly belonging to the other. Const 1963, art 3, § 2. If prospective application of the law might conceivably be justified when addressing a change in the common law (an area within the judiciary's unique purview) or when dealing with vested property rights or when imposing a new duty or obligation, no such rationale applies here. Any decision limiting the retroactive effect of this decision amounts to a usurpation of legislative prerogative to establish the limitation date for bringing claims. Instead, full retroactivity should apply.

The selective application of the ruling is also barred because it violates the principle of treating similarly situated persons the same. *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). In a concurring opinion, Justice Scalia cautioned against the idea that a court can tinker with retroactivity without violating significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent.

509 US at 105; 113 S Ct at 2522. Not surprisingly in light of this backdrop, Michigan courts have traditionally given litigants who successfully obtain a reversal of prior precedent, always after much risky investment of time, energy, and expense, the benefit of the new rule. *Placek v Sterling Heights*, 405 Mich 638, 690-691; 275 NW2d 511 (1979) (Coleman, C.J. dissenting because the majority "seemingly automatically" considered the benefits of the decision "to be due the parties in the instant case."). This traditional retroactive application of judicial decisions in all civil cases on direct review stems from a proper understanding of the court's function, which is to decide litigated issues brought before them. Shannon, at 838-839. A full

retroactivity approach would mean that the Court's holding would apply in any circumstance that it can be invoked under Michigan court rules.

This makes both practical and theoretical sense. According to commentators, "[p]rospective announcements of judge-made law raise both accuracy and legitimacy concerns." Shannon, at 849 quoting Michael C. Dorf, *Dicta and Article III*, 142 U Pa L R 1997, 2000 (1994). Prospective decision making is difficult to predict, potentially denies the litigants of the benefit of a decision in their favor, and often leads to ambiguous results in practice because the determination of whether events occurred before or after the date of a precedent-setting opinion can be difficult to ascertain. And prospective decisionmaking tends to undermine public confidence in the judiciary because it injects uncertainty into the process, undermines the notion that courts say what the law is, and not what it should be, and allows for a highly subjective approach.

Despite the longstanding understanding of the judiciary's limited role, as noted above, Michigan courts (as well as other state courts) have created a limited exception. This Court has occasionally restricted the effect of certain decisions that overrule past precedent. But it has done so in limited circumstances involving the overruling of uncontradicted, settled precedent whose resolution was not clearly foreshadowed (assuming a weighing of the three factors outlined above also warrants deviating from the general rule of full retroactivity). See, e.g., *Tebo v Havlik*; 418 Mich App 350; 343 NW2d 181 (1984); *Sturak v Ozomaro*, 238 Mich App 549; 606 NW2d 411 (1999); *Lindsay v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997). Whatever the merits of that approach in general, it is not suitable here.

We turn first to the threshold question of whether overruling *Lewis's* judicially-created tolling provision and replacing it with the statutory limitations period would constitute "clearly establishing a new rule of law." It must be observed that *Lewis* itself represented usurpation of

legislative action. This Court itself has flatly asserted that it has an obligation to correct such past abuses, an act which "restores legitimacy" to the system. *Robinson v Detroit,* 462 Mich 439, 472-473; 613 NW2d 307 (2000). And it did so without limiting the effect of its decision in *Robinson*. This central factor controls all other aspects of the three-factor *Linkletter* test embraced by this Court in *Pohutski*. The test: (1) the purpose of the "new" rule is to conform Michigan jurisprudence to the mandates of the Michigan Legislature; (2) there can have been no proper or legitimate reliance on a judicially-created rule of law adopted in contravention of the clear and unambiguous statutory text; and (3) the effect of full retroactivity on the administration of justice will be to honor the commands and prohibitions of the Michigan legislation.

In *Pohutski*, this Court quoted *Robinson's* teaching about retroactivity in the context of the prior misreading of a statute and explained:

> In considering the reliance interest, we consider "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real- world dislocations." *Id.* at 466, 613 N.W.2d 307. Further, we must consider reliance in the context of erroneous statutory interpretation:
>
> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory, ... that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Id.* at 467-468; 613 NW2d 307.]

> Thus, while too rapid a change in the law threatens judicial legitimacy, correcting past rulings that usurp legislative power restores legitimacy.
>
> *Id.* at 472-473 (CORRIGAN, J., concurring)
>
> Accordingly, we must shoulder our constitutional duty to act within our grant of authority and honor the intent of the Legislature as reflected in the plain and unambiguous language of the statute.

465 Mich at 694-694. More recently, this Court characterized the retroactivity aspect of *Pohutski* as an extreme measure warranted only because of exigent circumstances. *County of Wayne v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004). The *Hathcock* court cautioned that there "is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions." *Hathcock, supra* at 484 n 98. *Pohutski* was *sui generis* since it involved a history in which the Court had allowed recovery for trespass-nuisance claims against local governments that extended back to the 1800s. At the same time, after the *Pohutski* litigation began but before the Court issued its opinion, the Michigan Legislature created a new statutory cause of action. Thus, giving its decision retroactive effect would have, in the Court's view, carved out a tiny group of litigants who alone could not recover, when everyone before and after had the right to bring their claim. Critical to the Court's analysis was its effort to be faithful to what it undoubtedly perceived as a legislative signal when a new statute creating a cause of action was given immediate effect while *Pohutski* was pending before the Court.

Whatever the merits of *Pohutski's* decision to limit its effectiveness to prospective-only, those considerations do not apply here. To the contrary, the legislatively-enacted protection for Michigan no-fault insurers, which was intended to bar stale claims and avoid huge contingent liabilities, should be given full effect. Doing so will be consistent with this Court's philosophy of effectuating legislative pronouncements and enactments.

When the Court judicially decides whether to apply a principle that must be seen as a correct statement of the law to only some cases rather than to all cases, it harms the administration of justice. It results in an uneven application of law violating the basic norm of appellate law that like cases be treated alike. A directive that the holding is to have prospective application fosters the error arising from earlier courts' mishandling of MCL 500.3145(1), a mishandling that severely undercut the Michigan Legislature's explicit limitation of claims. Limiting the effect of its holding would lend judicial endorsement to the *Lewis* court's judicial legislation. Sound jurisprudential principles demand adherence to the general rule of full retroactivity. The Court has been criticized for engaging in what has been called Michigan's unprincipled retroactivity jurisprudence. See Moody, *Retroactive Application of Law-Changing Decisions in Michigan*, 28 Wayne L R 439 (1982); Baughman, *Justice Moody's Lament Unanswered: Michigan's Unprincipled Retroactivity Jurisprudence*, 79 Mich B J 864 (2000). See also Roosevelt, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 Conn L R 1075 (1999). Only under such an approach will the Court be vindicating the legislative enactment intended to limit the stale claims and contingent liability that impede insurance underwriting and add to the cost of premiums. It should decline any invitation to deviate from enforcement of the clear legislative text or to judicially-create a new effective date for the statute by limiting the effect of its decision.

RELIEF

WHEREFORE, the Insurance Institute of Michigan respectfully requests that this Honorable Court reverse the July 7, 2004 order of the trial court in the instant case, and to remand with instructions that plaintiff may recover only for losses incurred on or after November 12, 2001, one year prior to the filing of the complaint.

Respectfully submitted,

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DATED: March 17, 2005

STATE OF MICHIGAN

IN THE SUPREME COURT

EVA DEVILLERS, as Guardian and Conservator of MICHAEL DEVILLERS,

Plaintiff-Appellee,

-vs-

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant,

/

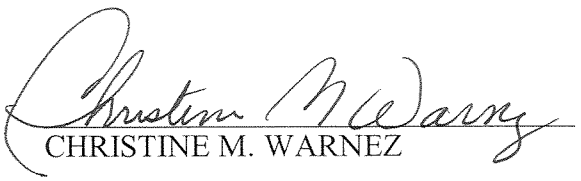
Supreme Court No. 126899

Court of Appeals
No. 257449

Oakland County Circuit Court
No. 02-045287-NF

PROOF OF SERVICE

CHRISTINE M. WARNEZ, being first duly sworn, deposes and says that on July 16, 2003, a copy of the Notice of Hearing, Motion for Leave to File Brief Amicus Curiae, and Brief Of Amicus Curiae The Insurance Institute Of Michigan, was served on HAROLD A. PERAKIS, Attorney for Plaintiff-Appellee, 24055 Jefferson Avenue, Suite 200, St. Clair Shores, MI 48080; and JAMES G. GROSS, Attorney of Counsel for Defendant-Appellant, 615 Griswold, Suite 1305, Detroit, MI 48226; and GREGORY D. VAN TONGEREN, Attorney for Defendant-appellant, 75 North Main Street, Suite 300, Mt. Clemens, MI 48043, by depositing same in the United States Mail with postage fully prepaid.



CHRISTINE M. WARNEZ

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